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**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Petition of Burnett County
Forest & Parks to Reestablish Water Levels for the
Clam Lake Dam, in the Town of Meenon, Burnett
County, Wisconsin

Case No.: 3-NO-97-07002

FINDINGS OF FACT, CONCLUSIONS OF LAW AND PERMIT

Burnett County Forest & Parks, County Road K, #106, Siren, Wisconsin, 54872, filed a petition with the Department of Natural Resources on November 7, 1995, pursuant to sec. 31.02, Stats., requesting the Department reestablish levels for the Clam Lake Dam. The Clam Lake Dam is located across the Clam River in the Southwest Quarter of the Northeast Quarter of Section 26, Township 39 North, Range 16 West, Burnett County. On December 11, 1997, the Department issued Findings of Fact, Conclusions of Law and Order which raised the water level by 3.6 inches.

By letter dated January 5, 1998, Daniel Rowe and Evelth Hoffman, by their Attorney Ned E. Ostenso, requested a contested case hearing pursuant to sec. 227.42, Stats. The Department granted the request for hearing by letter dated January 27, 1998. On May 20, 1999, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on July 20, 1999 at Siren, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ), presiding.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Department of Natural Resources, by

Attorney Michael Cam
P. O. Box 7921
Madison, WI 53707-7921

Burnett County Forestry and Parks, by

Michael Luedke, Administrator
7410 County K
Siren, WI 54972

Daniel Rowe, by

Attorney Ned E. Ostenso
25 9th Avenue N.
P. O. Box 458
Hopkins, MN 55343

Mary Huot
7006 Lonestar Road
Siren, WI 54872

James Besst
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Coon Rapids, MN 55448

Ron Houde
Sunnyside Road
Moundview, MN 55112

Gloria Bergstrom
2162 Mounds Avenue
New Brighton, MN 55112

Clam Lake Sportsman's Club, by

Dwaine W. Persells, Chairman
6529 Midtown Road
Siren, WI 54872

FINDINGS OF FACT

1. The Department of Natural Resources entered an Order dated December 11, 1997 (the DNR Order) which rescinded an earlier Public Service Commission Order dated December 7, 1956 (the PSC Order). The DNR Order established minimum and maximum water levels for the Upper and Lower Clam Lake, navigable waters of the state in Burnett County.

2. The DNR Order reflected detailed Findings of Fact, all of which were established by a preponderance of the credible evidence at hearing

Accordingly, the Division adopts the following Findings of Fact, taken from the DNR Order:

ADOPTED FINDINGS

1. The Clam Lake Dam is located across the Clam River in the southwest quarter of the northeast quarter of section 26, township 39 north, range 16 west, Burnett County. It is authorized by permit dated March 30, 1936 in docket 2-WP-233. It was constructed that year and is presently owned and operated by Burnett County. The purpose of the dam is to control levels in Upper and Lower Clam Lake whose maximum water level of 951.3 feet, and minimum level of 950.5 feet, Mean Sea Level datum (MSL), are established by Order 2-WP-1065 (1956).

2. At the dam the downstream drainage area is approximately 250 square miles. The dam is located about 2 1/2 miles north of state highway 70 which crosses between Upper and Lower Clam Lake. Upper Clam Lake, located south of state highway 70, encompasses 1,218 surface acres. Lower Clam Lake encompasses 337 surface acres.

3. The dam is at the site of a former logging dam destroyed in 1913. In 1932 a loose stone spillway was created at a highway bridge just above the dam site. The spillway effected the low water control desired but caused property flooding during high flow. It was partially removed in 1934 following a Public Service Commission order in the Matter.

4. The present dam has a concrete outlet section consisting of four gates 6 feet 4 inches wide and five gates 11 feet 4 inches wide. Gate sills are at elevation 946.80 feet MSL.

5. Information gathered from a 1996 survey and monitoring of six water level gauges indicate that Upper and Lower Clam Lake at low flow are substantially the same level as the pool above the Clam Lake Dam. During periods of high flow a water level gradient exists with higher water surface elevation on Upper Clam and a lower water surface elevation at the dam. The Clam Lake Dam can be effective for control of levels in Clam Lake at low flow. During periods of high flow natural river channel morphology below the dam restricts flow and limits the ability of the dam to pass flood flows even with all gates open.

6. Burnett County received numerous complaints during 1995 and 1996 regarding dam operation and Upper and Lower Clam Lake water levels. Complaints alleged both high water damage, lower water navigational problems and the failure of the County to operate the dam in accordance with water level Order 2-WP-1065 (1956). Water level records reviewed by the Department indicated that levels were frequently above those established by Order and that an unauthorized winter drawdown occurred annually beginning in the early 1970's to the present time. Due to the duration of these high water conditions many property owners and recreational users became accustomed to the higher levels. During this same period water levels exceeding 951.3 feet MSL, caused shoreline erosion in some areas and physically established an ordinary high water mark. Since April 22, 1997, levels have been held at or below 951.3 feet MSL, in compliance with the 1956 order.

7. The County requests authority to continue the practice of a winter level drawdown. Specifically, they request permission to fully open all gates at the dam during a period from October 1 5th through May 1 st. The minimum elevation will not exceed 15 inches below the summer minimum of 950.5 feet MSL- The drawdown would allow for storage of spring runoff waters and reduce shoreline damage caused by ice.

8. Department records indicate that waterfowl nesting on the Upper Clam Lake islands are adversely effected when water level at the state highway 70 exceeds 951.5 feet MSL, during the period from April 15th through mid-July.

9. Following an extensive investigation and review of survey records, existing bench marks and field work, the Burnett County Surveyor's office found conclusive evidence that the gauge at state highway 70 between Upper and Lower Clam Lake was installed and calibrated 1.07 feet higher than the actual mean sea level elevation. The error was a result of inaccurate placement of bench marks in the area. Subsequently, previous orders and operation of the dam was done with the assumption that this and previous gauges at this location were correct.

10. The elevations shown below in parentheses correspond to previous water level datum and are shown only to give the reader a point of reference regarding previous datum. The highlighted numbers correspond to the corrected mean sea level elevation. The following range of levels will be reasonable and within a range which has been normal for the Clam Lakes; the establishment of a minimum level for Upper and Lower Clam Lakes at elevation 949.7 (950.8) feet MSL, and a maximum level at elevation 950.5 (951.6) feet MSL, and at an elevation of 950.4 (951.5) feet MSL, the dam gates shall be opened progressively until all gates are opened fully at elevation 950 7 (951.8) feet MSL. The attached "Water Level Order" diagram provides a graphic representation of these levels. To reflect the new bench mark elevation and past calibration errors the water level gauge on the Highway 70 bridge shall be raised 1.07 feet and the above highlighted elevations referenced in all future records and correspondence.

11. Following a one-year authorized winter drawdown in 1973 the winter drawdown continued without appropriate authorization through 1996. The 15 inch drawdown has not caused significant adverse environmental effects and has minimized ice damage along the shoreline of Upper and Lower Clam Lake.

12. The Department has evaluated the proposed project in light of the Wisconsin Environmental Policy Act (Section 1.11, Wisconsin Statutes) and has determined that the grant or denial of the permit would not be a major state action significantly affecting the quality of the human environment.

ADDITIONAL FINDINGS

13. Daniel Rowe appeared at the hearing to contest adoption of the DNR Order. Significantly, while numerous others appeared at hearing in support of the DNR Order, Rowe was the lone objector. Mr. Rowe attempted to show that establishment of the higher water level would detrimentally impact his property by contributing to shoreline erosion. However, Rowe

did not demonstrate a substantial likelihood of erosion on his property if the new summer maximum is maintained. (See: Discussion)

14 The provision for weekly reading of water levels is reasonable and sufficient. Daily readings would involve more cost and effort and would not be a substantial improvement over weekly readings. (Haack)

15. The newly established 1997 maximum summer water level reflects the public interest by balancing Rowe's concerns about shoreline erosion with the widespread public support for maintaining higher water levels necessary for public boating and recreational opportunities on Clam Lake. Numerous persons testified that the higher water levels were needed to gain riparian access to the lake, and to allow for safe boating on the lake.

DISCUSSION

There is wide public support for the 1997 DNR Order, which rescinds the 1956 PSC Order and has the practical effect of raising the maximum summer water level by approximately 3.6 inches. There is no question that there was a substantial period from at least 1990 to 1996, when the water level on Clam Lake exceeded the maximum level provided for in the 1956 PSC Order (Rowe, Ex. 8) Mr. Rowe owns a flood plain parcel that is among the lowest areas on Clam Lake. (Ex. 12) During the period in which the water levels were maintained well in excess of the 1956 PSC Order, Mr. Rowe experienced substantial erosion, which led him to install 900 feet of riprap in 1992. Significantly, since installing the riprap, Mr. Rowe has not lost any property to erosion. This is true even though the water level during the period from 1992 to 1995 exceeded not only the old PSC Order maximum, but also the new summer maximum as established by the 1997 DNR Order. (Exs. 8 and 13) A clear preponderance of the credible evidence accordingly demonstrates that it is unlikely that there would be significant erosion on the Rowe property if the 1997 water level is properly maintained. Rowe concedes that the new summer maximum would result in water at or below the level of his riprap. However, he raises concerns about the impact of storm events, which are slow to subside, and fears that the new maximum level will be exceeded as regularly as the 1956 Order. However, there have been extended periods when the water level exceeded the 1997 DNR maximum level, and there was no loss of property by Rowe after placement of riprap.

With respect to the failure to follow the maximum water levels proscribed by Order, Rowe raises a significant point. Clearly, public expectations of higher water levels corresponded with the extended periods of maintaining levels in excess of the 1956 Order. Further, reliance upon these higher levels included the construction of homes and other investments reflecting the public expectation of the higher levels. The 1997 Order does an excellent job of balancing the public interest in recreational boating and access to water and concerns about erosion in lower areas of the lake. However, to be effective the Order must be followed closely by Burnett County and must be enforced by the DNR.

CONCLUSIONS OF LAW

1 The Division of Hearings and Appeals has authority to hear contested cases and issue necessary Orders relating to the establishment of water levels on navigable waters of the state pursuant to sec. 227.43, and sec 31.02(1), Stats.

2. The DNR Order entered December 11, 1997, 3-NO-1997-07002, is reasonable and necessary and within the Department's lawful authority pursuant to sec. 31.02, Stats.

3. Establishment of new water levels for controlled lakes and flowages under sec. 31.02, Stats., is a type IV action under sec. NR 150.03(8)(f)(8), Wis. Adm. Code. Type IV actions do not require preparation of a formal environmental impact statement.

ORDER

The Order of the DNR dated December 11, 1997, is HEREBY ADOPTED IN ITS ENTIRETY, as follows:

IT IS THEREFORE ORDERED THAT:

1. That the Public Service Commission Order 2-WP-1065 dated December 7, 1956, is hereby rescinded.

2. That the minimum summer water level elevation of Upper and Lower Clam Lake is hereby established at elevation 949.7 feet MSL, elevation and shall be in effect each year during the period from May 1st to October 15th.

3 That the maximum summer water level elevation of Upper and Lower Clam Lake is hereby established at elevation 950.5 feet MSL, elevation and shall be in effect each year during the period from May 1st to October 15th; provided that when the water level elevation in said lakes reaches 950.4 feet MSL, the dam gates shall be opened progressively until all gates are opened fully at 950.7 feet MSL, and the gates shall be kept fully opened until the water level recedes below elevation 950.5 feet MSL, at which time sufficient gates shall be closed to regulate the lake levels between the summer time minimum and maximum listed above

4 That the minimum winter elevation of Upper and Lower Clam Lakes is hereby established at 948.45 feet MSL elevation or 15 inches below the minimum summer water level elevation of 949.7 feet MSL. This level is in effect each year during the period after October 15th, with drawdown being completed prior to ice cover, and repooling of summer levels following ice out and prior to May 1st.

5 That weekly readings be made of the water level in the Clam Lakes at the gauge on the state highway 70 bridge from April 1st through November 1st each year. These water level readings shall be recorded and kept on file by Burnett County. Such record shall be made

available to this Department upon request. Water levels and the dam operational procedures as specified in this order shall be maintained in accordance with the levels indicated on the highway 70 bridge water level gauge.

Dated at Madison, Wisconsin on August 20, 1999.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By. 
JEFFREY D. BOLDT
ADMINISTRATIVE LAW JUDGE

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.

3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.